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In the Supreme Court of the United States

OCTOBER TERM, 1934

No. 2

THE UNITED STATES, PETITIONER

v.

THE CREEK NATION

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the Court of Claims is not yet reported.

JURISDICTION

The judgment of the Court of Claims was entered March 13, 1933. A motion for a new trial was overruled December 4, 1933 (R. 21). The petition for a writ of certiorari was filed March 2, 1934, and was granted April 9, 1934 (R. 23). The jurisdiction of this Court rests upon Section 3(b) of the Act of February 13, 1925, c. 229, 43 Stat. 936, 939 (U.S.C., Title 28, Sec. 288).

QUESTIONS PRESENTED

(1) Whether under the jurisdictional Act which authorizes the Court of Claims to "adjudicate and render judgment in any and all legal and equitable claims arising under or growing out of any treaty or agreement between the United States and the Creek Indian Nation or Tribe, or arising under or growing out of any Act of Congress in relation to Indian affairs", which the Creek Nation or Tribe may have against the United States, there is authority to award a judgment against the United States for damages arising either out of errors of its officers in making or approving a survey of lands, or arising out of its failure in its alleged duty as guardian of the tribe to secure the restoration to the tribe of possession of lands owned by the tribe.

(2) Whether, if the tribe is entitled to recover on the theory that the United States is liable for failure to secure possession of the lands to the tribe, the measure of damages should be the full value of the fee as of the time of filing the petition, as held by the court below, or whether the recovery should be measured as in trespass, namely, the injury to the land and mesne profits.

(3) Whether an erroneous survey approved by the Commissioner of the General Land Office whereby land belonging to the Creek Tribe was placed within the boundaries of the Sac and Fox Reservation and thereafter, pursuant to a cession

of the Sac and Fox Reservation to the United States, erroneously patented to settlers, constituted a taking of said land or interests therein by the United States.

STATUTE INVOLVED

The material provisions of the Jurisdictional Act of May 24, 1924, c. 181, 43 Stat. 139, 140, under which the cause of action was brought, are as follows:

> That jurisdiction be, and is hereby, conferred upon the Court of Claims, notwithstanding the lapse of time or statutes of limitation, to hear, examine, and adjudicate and render judgment in any and all legal and equitable claims arising under or growing out of any treaty or agreement between the United States and the Creek Indian Nation or Tribe, or arising under or growing out of any Act of Congress in relation to Indian affairs, which said Creek Nation or Tribe may have against the United States, which claims have not heretofore been determined and adjudicated on their merits by the Court of Claims or the Supreme Court of the United States: * * * *
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> * * * * *
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> SEC. 3. In said suit the court shall also hear, examine, consider, and adjudicate any claims which the United States may have against said Indian nation, but any payment which may have been made by the United States upon any claim against the United

States shall not operate as an estoppel, but may be pleaded as an offset in such suit.

STATEMENT

The material findings of fact of the court below may be summarized as follows:

The action was brought under the authority of the Act of Congress approved May 24, 1924, c. 181, 43 Stat. 139, (Special Findings I, R. 5–7), conferring jurisdiction upon the Court of Claims "to hear, examine, and adjudicate and render judgment in any and all legal and equitable claims arising under or growing out of any treaty or agreement between the United States and the Creek Indian Nation or Tribe, or arising under or growing out of any Act of Congress in relation to Indian affairs, which said Creek Nation or Tribe may have against the United States, * * *."

By the Treaty of February 14, 1833, 7 Stat. 417 (Special Finding II, R. 7), between the Creek Nation and the United States, the United States granted to the Creek Nation in fee simple a tract of land in what is now the State of Oklahoma. Thereafter by Treaty of June 14, 1866, 14 Stat. 785 (Special Finding III, R. 7), between the same parties, the Creek Nation ceded to the United States the western one-half of the lands granted as aforesaid. Article VIII of this treaty contained the following provisions (14 Stat. 788):

It is agreed that the Secretary of the Interior forthwith cause the line dividing the

> Creek country, as provided for by the terms of the sale of Creek lands to the United States in article third of this treaty, to be accurately surveyed under the direction of the commissioner of Indian affairs, the expenses of which survey shall be paid by the United States.

In 1871 one Bardwell, under the direction of the Indian Office, and pursuant to the provisions of the last-named treaty, surveyed the line dividing the Creek lands. Although the survey thus made may not have correctly divided said lands, as was contemplated under the treaty, any error therein made is not material here, because the controversy upon this question was settled by an agreement whereby the Creek Nation ceded to the United States "without reservation or condition, full and complete title to the entire western half of the domain of the said Muscogee (or Creek) Nation lying west of the division line surveyed and established under the said treaty of eighteen hundred and sixty-six", and also granted and released to the United States "all and every claim, estate, right, or interest of any and every description in or to any and all land and territory whatever, except so much of the said former domain of the said Muscogee (or Creek) Nation as lies east of the said line of division, surveyed and established as aforesaid, and is now held and occupied as the home of said nation." Act of March 1, 1889, c. 317, 25 Stat. 757, 758 (Findings IV and V, R. 7–8).

On February 18, 1867, a treaty was entered into between the United States and the Sac and Fox Indians, whereby the United States ceded to these Indians, as a reservation, a tract of land not exceeding 750 square miles in the Indian Territory south of Kansas, the reservation to be selected under the direction of the Secretary of the Interior (Article VI, 15 Stat. 495, 496). Thereafter an area was selected immediately west of the Creek reservation but one Darling, in making a survey in 1872 of the Sac and Fox reservation, pursuant to the treaty with these Indians, erroneously ran his division lines between the Creek lands and the Sac and Fox reservation into the Creek domain, thereby including as a part of the Sac and Fox reservation 5,575.57 acres of Creek land. The Darling survey was examined and approved by the Commissioner of the General Land Office on February 15, 1873. (Findings VII, VIII, IX, R. 8–9.) In 1875, one Hackbush made a resurvey of Darling's section lines and subdivided the sections into forty-acre tracts. In so doing he perpetuated the errors of Darling (Finding X, R. 9). Both the Darling and Hackbush surveys were examined and approved by the General Land Office without knowledge of the errors (Findings VIII and X, R. 9).

By an agreement entered into between the Sac and Fox Nation and the United States, approved by Act of Congress of February 13, 1891, c. 165, 26 Stat. 749, the Sac and Fox Nation ceded all of

its reservation to the United States. The agreement provided that, after certain allotments had been made to the Sac and Fox Indians, the residue of the land ceded should become public lands of the United States and subject to white settlement. The 5,575.57 acres of land erroneously included in the Sac and Fox reservation was thereupon opened to settlement and patents to settlers were subsequently issued by the United States (Findings XI, XII, XIII, R. 9–10).

Controversies arose with respect to the errors in the surveys above referred to (see opinion below, R. 13); thereupon resurveys of the west boundary of the Creek Nation were made in 1895, 1896, and 1905, through which the original boundary line as established by Bardwell was determined to be the west boundary line of the Creek Nation. Thereafter Congress, by Act approved June 21, 1906, c. 3504, 34 Stat. 325, 364, declared the line as established by Bardwell in 1871 and reestablished by the surveys of 1895 and 1896 to be the west boundary of the Creek Nation (Finding XIV, R. 10).

As a result of the erroneous survey by Darling in 1872, the Creek Nation has been deprived of the use and occupation of the 5,575.57 acres since the date of the Darling survey, with the exception of 118.4 acres which were allotted to members of the Creek Nation and 2.88 acres which were sold as unallotted lands of the Creek Nation (Findings XV, XVI, R. 10).

The court made no finding with respect to value other than as set forth in Finding XIX, as follows (R. 11):

> The fair average market value, for all purposes, of the land involved, was on July 3, 1926 [the date the petition was filed in the Court of Claims], $30.00 per acre. This value includes the surface, lease, and royalty values.

Whereupon the court allowed the Creek Nation to recover the sum of $163,628.70, found to be the full value of the land on the date the petition was filed, and held that the United States was entitled to recover from the Creek Nation on its counterclaim the sum of $76,805.51 (R. 11). Judgment for the Creek Nation in the sum of $86,823.19 was thereupon entered (R. 21).

The petition below substantially set forth the facts as herein stated and sought a recovery on the theory that it was the duty of the United States, having "entire control of the affairs of" respondent, to procure the restoration of possession of the tract of land involved to respondent, and having failed in this duty the United States is liable to respondent for the full value of the land (R. 3, 4).

SPECIFICATION OF ERRORS TO BE URGED

The court below erred:

1. In holding that the jurisdictional Act authorized a recovery on a claim arising out of the failure

of the United States to secure the restoration to the Creek Nation of possession of the lands involved.

2. In holding the correct measure of damages to be the value of the land for all purposes as of the date of the bringing of the action.

3. In holding that a "taking" of the land by the United States was not accomplished either by the approval of the Commissioner of the General Land Office of the erroneous Darling survey of 1872, whereby the land was included within the Sac and Fox reservation, or by the opening of the land to settlement and issuance of patents to settlers thereon pursuant to the cession of the Sac and Fox reservation.

SUMMARY OF ARGUMENT

The jurisdictional Act limits the jurisdiction of the Court to claims "arising under or growing out of any treaty or agreement between the United States and the Creek Indian Nation or Tribe, or arising under or growing out of any Act of Congress in relation to Indian affairs." The petition predicates the tribe's right to recovery upon the failure of the United States to take action on behalf of the tribe to restore possession of the lands involved to the tribe (R. 3). The court below, although holding that the acts of the United States with respect to the lands did not constitute a "taking", awarded a judgment for the full value of the lands as of the date of the filing of the petition. The judgment of the court below, therefore,

rests upon one of the following grounds: (a) that the United States is liable for the errors of Surveyor Darling and the Commissioner of the General Land Office, or (b) that the United States is liable for violation of its duty as a fiduciary to procure the restoration of possession of the lands to the tribe. It is the contention of the petitioner that the jurisdictional Act does not authorize a recovery based upon either of said grounds.

If, however, the court below correctly held that the jurisdictional Act authorizes a judgment founded upon errors of Government officers, or upon the failure to procure the restoration of possession of the lands to the tribe, it is then the contention of the petitioner that the court below has adopted an erroneous measure of damages. The court below having held that there was not a taking, the injury necessarily arises out of a trespass. Notwithstanding the rule that recovery in a case of trespass is limited to the damage to the land and mesne profits, the court below awarded a recovery of the full value of the land as of the date the petition in the case was filed.

ARGUMENT

I

SCOPE OF JURISDICTIONAL ACT

Under the jurisdictional Act consent is given that the United States may be sued by the Greek Nation or Tribe of Indians on any legal or equitable

claim arising under or growing out of any treaty or agreement between the United States and said tribe of Indians or arising under or growing out of any Act of Congress relating to Indian affairs. Notwithstanding the failure of the special findings of the court below to disclose the violation by the petitioner of any treaty obligation or the violation by petitioner of any right of respondent acquired by virtue of an Act of Congress relating to Indian affairs, that court has awarded a judgment in favor of the respondent.

At the trial of this case in the court below, the petitioner defended upon the theory that there had been a "taking" of the respondent's lands; that such "taking" was accomplished either by the approval of the erroneous Darling survey which placed the lands within the boundaries of the Sac and Fox reservation, or by the subsequent issuance of patents to settlers following the cession of the Sac and Fox reservation, and that the respondent's recovery should be the value of the lands as of the date of "taking." Although the court below found that there had not been a "taking" of the lands by the petitioner or any interest therein, a judgment was rendered against the petitioner for an amount found to be the full value of the land as of the date of the institution of the respondent's action.

It will be observed from the opinion of the court below (R. 18) that the judgment of the court is predicated upon the principle that the petitioner

is liable for its failure to secure the restoration of possession of the lands to the respondent. If such a duty arose at all, it arose out of a political relationship, and not out of a contractual obligation; and the jurisdictional Act does not authorize a judgment based upon a failure to perform such a duty. *United States* v. *Old Settlers,* 148 U.S. 427, 469; *United States* v. *Choctaw Nation,* 179 U.S. 494, 533.

In the case of *Choctaw and Chickasaw Nations* v. *United States,* 75 C.Cls. 494, the language of the jurisdictional Act with respect to the scope of jurisdiction is the same as that used in the instant Act. In that case the tribes presented a claim arising out of the failure of the United States, as a fiduciary, to take proper steps for the collection of rents and for taking forfeitures on railroad station reservations. In the opinion sustaining a demurrer to the petition Chief Justice Booth, speaking for the Court, said (pp. 497–498):

> It is difficult to ascribe to plaintiffs' cause of action any other grounds than an omission to perform a duty cast upon the Government, as the plaintiffs claim by law. If the Government was solely responsible for the loss complained of as a trustee or guardian of the plaintiffs' lands and property, and in that capacity the only party legally capable of asserting plaintiffs' rights in court, and as such negligently refused and continues to refuse to act, this, in our opinion, is a direct and specific allegation of

omission to perform a duty, and plaintiffs' cause of action is predicated upon the common law liabilities pertaining to the relationship of guardian and ward.

If it should be said that the judgment of the court below is justified for the reason that the injury complained of has arisen out of errors of officers of the petitioner, the answer is that the jurisdictional Act does not consent that the petitioner be sued on such a claim. It is plain that the jurisdictional Act limits the right of suit to claims arising out of contractual obligations, or claims arising out of a violation of a right which has become vested by virtue of an Act of Congress. Jurisdictional Acts must be strictly construed, *Price* v. *United States and Osage Indians*, 174 U.S. 373, 375, and they make no admission of liability, *United States* v. *Mille Lac Chippewas*, 229 U.S. 498, 500.

It is the petitioner's view that a judgment for the respondent is justified only upon a finding that the fee to the land or a lesser estate therein has been taken by the petitioner.

II

MEASURE OF DAMAGE

If the court below correctly held that there was not a "taking" of the respondent's land or any interest therein, then the injury to the respondent necessarily arises out of trespasses committed by

the Sac and Fox Indians and afterward by settlers who went upon the land under patents which did not convey title. The petitioner was not, and could not be, a trespasser (*Pope* v. *United States*, 26 C.Cls. 11, 13).

Therefore if under the jurisdictional Act there is authority to award a judgment against the petitioner to compensate the respondent for losses caused by the petitioner's failure to perform the alleged duty as guardian of the respondent of procuring the restoration of possession of the land to the respondent, or for a trespass brought about through errors of officers of the petitioner, it is urged that the measure of damage is precisely the same as would apply in a case where the action was against the trespasser, namely, injury to the land and mesne profits. However, the court below awarded a recovery for the full value of the land as of the time of the filing of the respondent's petition, thereby adopting the same measure of damages as would be applicable if there had been a taking of the entire interest of the respondent in the land on that date.

That the court below committed error in determining the measure of damage is apparent for the further reason that although the judgment does not destroy the Indians' title to the property, or their right of possession, the award is made to cover its full value as if all right, title, and interest therein had been taken. The bar of former adjudication

would be unavailing in an action to recover for trespass accruing subsequent to the judgment. It is a well-established rule that in a trespass or a series of trespasses which amount to an appropriation or an attempt to appropriate the land itself or its use to the use of the trespasser, damages are to be assessed for the trespass only and not for the permanent appropriation of the land. *Stowers* v. *Gilbert,* 156 N.Y. 600.

Upon the authority of the decision in the case of *Fort Berthold Indians* v. *United States,* 71 C.Cls. 308, and other decisions of that court, it was the contention on behalf of the petitioner in the court below that the acts of the officers of the petitioner, as set forth in the findings, constituted a taking of the land by the petitioner and that the damages for the taking should be held to be the value of the land as of the date of such taking.

If under the correct view of the case there was a taking, it follows that the court below has erred in its determination of the amount of damages.

CONCLUSION

It is therefore contended that:

(a) If the court below correctly held that there was not a taking, the petition of the respondent should be dismissed for want of jurisdiction.

(b) If, however, there was a taking or if under the jurisdictional Act respondent is entitled in law to recover for losses arising either from the errors

of the petitioner's officers, or arising out of the petitioner's failure to perform its alleged duty as guardian of the respondent of procuring the restoration of possession of the lands to the respondent, the court below has adopted an erroneous measure of damages.

Wherefore, it is respectfully submitted that the judgment of the court below should be reversed.

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